

Re: Omnibus Anti-Drug Bill

OCA 3355-88

Provisions of concern

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- § 1004 (5) (N) defining "National Drug Control Program" to include the CIA and all other intelligence community agencies;
- § 1006(c) (3) (B) authorizing the Director of the new Office of National Drug Control Policy (ONDCP) to "direct and coordinate all Federal Government drug supply reduction efforts, including international, intelligence, interdiction, and domestic drug law enforcement";
- § 1004(3) defining "supply reduction" to include any activity conducted by a National Drug Control Program agency that is "designed to reduce, directly or indirectly", the supply of drugs in the U.S." and abroad, including, but not limited to "international drug control, "foreign and domestic drug enforcement intelligence", interdiction, and domestic drug law enforcement;
- § 1006(c) (3) (F) authorizing the ONDCP Director to "direct and coordinate the collection and dissemination of information necessary to implement" U.S. policy regarding drug supply efforts;

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- § 1006(c)(3)(G) authorizing the ONDCP Director to develop "with the advice of" National Drug Control Program department and agency program managers a consolidated National Drug Control Program Budget;
- § 1006(d) authorizing the ONDCP Director to receive, "approve or revise", albeit after consultation, the drug control budget requests from each National Drug Control Program department and agency, and to assign responsibilities to entities with functions under a "national drug control strategy";
- § 1008(b) requiring the "national drug control strategy" to include goals and priorities in, among other things, international narcotics control, intelligence activities relating to drug supply reduction efforts, interdiction and domestic drug law enforcement;
- § 1007(a) requiring all departments and agencies to provide the ONDCP with all information "necessary and relevant" to program and strategy development and to give "complete consideration" to ONDCP requests for support. (A provision is included authorizing the Director of Central Intelligence to prescribe regulations "as may be necessary to protect the sources and methods of intelligence program information" provided to the ONDCP Director);
- § 1007(c) requiring each National Drug Control Program department and agency to provide the ONDCP Director with prior notice of "any proposed changes in policies" concerning program-related activities, except in exigent circumstances, and await a certification of consistency with the program;
- § 1008(b)(4) requiring that the national drug control strategy include a "mechanism of independent, outside, annual assessment of the effectiveness" of the strategy and "all programs" administered under it;
- § 1008(b)(6), (c) authorizing the ONDCP Director to designate lead agencies in various subject areas and requiring subordinate program entities to notify and obtain prior approval from that agency of any activity in that area; and

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- § 2989 authorizing the ONDCP to develop a plan to use federal research facilities, including CIA and NSA "imaging/electronic surveillance" research and development facilities, to support and develop technologies for "Federal law enforcement agency missions".

Putting these provisions together, it is evident that the ONDCP and its Director will have command and budgetary authority over the various elements of the intelligence community including CIA, NSA, FBI and various DOD components. The ONDCP Director will be empowered to determine the extent and nature of the role they should play in the drug control effort, assign activities they must undertake as part of the program, identify the resources that must be expended in that regard, establish their priorities, commandeer their research capabilities, have complete access to the information they acquire (subject only to protection of sources and methods in certain circumstances), veto any proposed deviations from assigned functions, and audit their efforts in order to ensure compliance.

While the intelligence agencies are obviously a key element in the critical effort to combat narcotics activities, the wholesale transfer of operational and budgetary control over these entities to an outside, single-minded, primarily law enforcement organization could have serious detrimental effects on our national security and legal structure. To the extent the ONDCP Director will have unfettered authority to direct the resources of the intelligence agencies to the drug control program, the performance of their other critical foreign intelligence and counterintelligence functions must, of necessity, suffer. Also, the traditional and highly sensitive barriers that have been carefully crafted over the last fifty years to avoid combining the foreign intelligence and law enforcement functions in any single agency and to ensure the legality of intelligence operations will be seriously eroded, if not erased, by the ONDCP power to direct activities and by forcing intelligence and law enforcement programs, personnel and priorities to become hopelessly entangled. There is some recognition of limits in the information access provisions but the audit function is open-ended and will cause concern regarding the security of intelligence programs. The creation of intelligence elements that must be approved and considered as part of a separate drug control budget could threaten the coherence of the National Foreign Intelligence Program Budget which has been so central to the increased role of the Director of Central Intelligence in ensuring efficiency and reduction of waste, duplication and mismanagement.

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I recognize that these concerns will not be alleviated by slight modifications but may require extensive reconsideration of the role that the drafters of this legislation perceive for the intelligence agencies in the anti-narcotics effort. Time and political considerations appear to weigh against the latter. Nonetheless, an effort should be made to modify the bill to make clear that the intelligence community is a full partner in the effort and must work closely with the ONDCP but has an independent status and legal framework that must be accommodated.

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In another regard, I would note that section 2692 will make it a crime to mail or send by interstate commerce, except to certain authorized recipients, any device or tool that is designed to be used to manipulate, open, or bypass any lock or security device. The authorized recipients do not include U.S. or foreign government officials. We have in the past had difficulties with a similarly broad provision in Title 18 that bars the manufacture, sale, etc., of electronic surveillance devices. I would strongly urge that the FBI and CIA be asked to review this section closely to ensure it will not interfere with their operational activities if it is enacted.

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Please let me know if you would care to discuss these comments further.

Re: H.R. 5210

Omnibus Drug Initiative Act of '88

House Omnibus Drug Initiative Act of 1988, H.R. 5210. The relevant provisions for our purposes are:

- § 3071 stating the "sense" of Congress that U.S. intelligence agencies should use covert action more actively to combat illicit narcotics trafficking; and
- § 11001 requiring that all federal employees furnish other agencies with any information they may obtain in their work about "illegal foreign drug activities" in accordance with procedures to be established by the President. These procedures will designate the agencies the President determines should be advised, to include agencies involved in foreign policy, law enforcement, or other agencies. The procedures will also require that such information be shared between agencies as appropriate.

Except for the fact that the first provision only manifests a congressional interest and the second allows for broad presidential discretion, these provisions would have serious legal and policy implications for the intelligence agencies. If Congress were to require these agencies to engage in covert action for narcotics interdiction purposes, a separation of powers issue would be raised as well as a risk of intermingling law enforcement and intelligence activities in a way that is inconsistent with the current statutory and regulatory structure. Similarly, requiring

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intelligence agency employees to disclose and share all information regarding foreign narcotics activities that would be illegal if conducted in the U.S. would raise serious security concerns and also confuse the intelligence/law enforcement division.

Thus, it is important that these provisions remain in their present form if they are retained and enacted into law. Any changes that would reduce presidential discretion in either context should be carefully reviewed

